No. 944

In the Supreme Court of the United States

OCTOBER TERM, 1944

LESLIE BEN DAVIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	8
Conclusion	12

CITATIONS

Cases:	
Bailey v. *United States*, 13 F. 2d 325	11
Brasfield v. *United States*, 272 U. S. 448	10
Clyatt v. *United States*, 197 U. S. 207	10
Crawford v. *United States*, 212 U. S. 183	10
Hemphill v. *United States*, 312 U. S. 657	10
United States v. *Atkinson*, 297 U. S. 157	10
Weems v. *United States*, 217 U. S. 349	10
Wiborg v. *United States*, 163 U. S. 632	10
Williamson v. *United States*, 207 U. S. 425	10
Statutes:	
The Federal Explosives Act (Act of October 6, 1917, c. 83, 40 Stat. 385, as amended by the Act of December 26, 1941, c. 633, 55 Stat. 863–868, 50 U. S. C., Supp. I, 121–143)	4, 11
Section 2	2
Section 4	2
Section 6	2
Section 9	2
Section 19	3
Section 20	3
Section 37 of the Criminal Code, 18 U. S. C. 88	3

635346—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 944

LESLIE BEN DRAKE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 36–37) is reported at 145 F. 2d 825, *sub nom. Sanderson et al.* v. *United States.*

JURISDICTION

The judgment of the circuit court of appeals was entered December 9, 1944 (R. 37). A petition for rehearing was denied January 13, 1945 (R. 42). The petition for a writ of certiorari was filed February 12, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the circuit court of appeals was justified in affirming petitioners' convictions as against their contention that plain error had been committed at their trial.

STATUTES INVOLVED

The Federal Explosives Act (Act of October 6, 1917, c. 83, 40 Stat. 385, as amended by the Act of December 26, 1941, c. 633, 55 Stat. 863–868, 50 U. S. C., Supp. I, 121–143) provides, in part, as follows:

> SEC. 2 * * *
>
> Except as provided in section 4,[1] no person shall possess, purchase, accept, receive, acquire, or use explosives or ingredients unless such person is licensed under this Act.
>
> SEC. 6 [This section provides for the issuance of licenses by the Director of the Bureau of Mines]
>
> * * * * *
>
> SEC. 9. Unless the explosives and ingredients are to be purchased or accepted pursuant to section 4, any person desiring to manufacture, distribute, store, sell, issue, give, possess, purchase, accept, receive, ac-

[1] Section 4 permits licensed employees to sell or issue explosives to subordinate employees.

quire, or use explosives or ingredients shall make application for a license under this Act. * * *

SEC. 19. Any person violating any of the provisions of this Act or any rules or regulations made thereunder shall be guilty of a misdemeanor and shall be punished by a fine of not more than $5,000 or by imprisonment of not more than one year, or by both such fine and imprisonment.

SEC. 20. The provisions of this Act and the regulations issued hereunder shall become operative only upon a declaration of war or of the existence of a state of war by the Congress * * * and shall remain operative until the termination of the war * * *.

Section 37 of the Criminal Code, 18 U. S. C. 88, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

On January 26, 1944, petitioners (Leslie Ben Drake and Gilbert Allen Sanderson) and J. R. Clark and Floyd Edward Oldham were indicted

in one count in the District Court for the Northern District of Texas for conspiring to violate 50 U. S. C. A. 121–141, the Federal Explosives Act, *supra*[2] (R. 1–3). The indictment charged that the defendants on January 12, 1944, conspired, at a time when the United States was at war, to possess explosives, fuses, and detonators without having applied to the Director of the Bureau of Mines for a license to possess them (R. 2). Two overt acts were alleged to have been committed by the defendants pursuant to the conspiracy, the first of which was that they rode in an automobile near the post office in Dallas, Texas, at 1:15 a. m. on January 12, 1944, and the second, that on the same date they traveled in an automobile "with a quantity of explosives, including dynamite, an unexploded dynamite cap, and a fuse, together with burglar tools and implements used in the opening, cracking and blasting of safes, and other strong boxes" (R. 3). Petitioner Drake's attorney was appointed to represent petitioner Sander-

[2] The indictment, apparently through inadvertence, cited the sections as they appear in the 1928 edition of Title 50 of United States Code Annotated. The amending act of December 26, 1941, revised the original act of 1917 and redistributed the subject matter into differently numbered sections, with the result that the sections as they are incorporated in the United States Code, Supp. I, are likewise numbered differently than they were in the earlier editions both of the Code and the Annotated Code. However, the substance of the sections here involved was not changed by the amending Act.

son and the other defendants upon their request for appointment of counsel, after it appeared to the satisfaction of the court that there was no conflict of interest among the several defendants (R. 5). After a jury trial, each of the defendants was convicted and sentenced to imprisonment for a term of two years (R. 4, 21–22, 27). On appeal by petitioners to the Circuit Court of Appeals for the Fifth Circuit,[3] the judgments of conviction were affirmed (R. 36–37).

Although the sufficiency of the evidence is not directly involved, we present a summary thereof in order that the Court may be aided in appraising the question presented by the petition:

Maddox, a Dallas police officer, testified that while he was on patrol on January 12, 1944, at about 1:10 a. m., he noticed an automobile parked near the post office, with no one in it. He came back later and observed defendant Clark standing on the corner and he "thought there was something wrong with the way he was acting." He returned again and saw the defendants in the car. Upon questioning them, petitioner Drake said that his name was "J. C. Wilson," which Maddox knew was not true. Thereupon, he took the defendants into custody and searched them, but found no "firearms or knives." (R. 6–7.) At the jail, the car was searched, and Maddox

[3] Clark also appealed, but his appeal was dismissed upon his own motion (R. 35–36).

found a "kit of tools * * * like burglar tools * * * that would open any kind of strong-box" (R. 7). He also found dynamite in the tool kit, and in the car a dynamite cap, and in petitioner Sanderson's pocket a fuse (R. 7). On cross-examination, Maddox gave a detailed description of the "burglar tools" and testified that when the defendants were questioned, they stated that they had been on a "drinking party"; that although he could "smell whiskey," the defendants were not intoxicated (R. 7). Maddox's testimony was corroborated by a police officer who was on patrol with him (R. 9–10). The Dallas police department property custodian testified that on the occasion of the defendants' arrest the "burglary tools and explosives" were turned over to him (R. 10). An agent of the Federal Bureau of Investigation testified that upon questioning the defendants, they told him that they did not have a license for the possession of explosives; that he was present when the explosives were examined, and he was satisfied that they were explosives from his own knowledge and the "experts told him they were satisfied" (R. 11). An explosives dealer testified that he examined the explosives and that the amount he saw would "tear counsel table * * * all to pieces and blow it all over the Court room; that it was sufficient to open a safe or strong-box" (R. 10–11). There was also testimony that petitioner Drake and defendant

Oldham obtained the dynamite from a man who wanted "to give it away," and that when they obtained it, they put it in the car (R. 8–9).

Petitioner Sanderson and defendant Clark testified in their own behalf, and Maddox was also called as a witness by the defendants (R. 12–17). In substance, Sanderson disclaimed any knowledge of the fact that explosives were in the car or that the fuse which was found in his pocket was a dynamite fuse (R. 12–15). He admitted that he had previously been convicted of assault with intent to murder and of robbery (R. 15). Clark, likewise, denied any knowledge of the fact that there were explosives in the car; he admitted that he had been convicted of aggravated assault and burglary (R. 16–17). Maddox testified that the dynamite was found in the car shortly after the defendants were arrested (R. 12).

The trial court instructed the jury that the burden was upon the Government to prove the defendants' guilt beyond a reasonable doubt (R. 19); that the jury was not to consider as a basis for conviction the fact that the defendants had burglar's tools, which it permitted "to come into the case to show the surrounding circumstances and attitude of the parties—you can consider it as throwing light upon their probable intention" (R. 19–20). It also instructed as to the proof necessary to establish the conspiracy (R. 21). No ob-

jection was made by the defendants to the charge (R. 21).

ARGUMENT

Petitioners concede (Pet. 2–3, 14) that at their trial they did not object to the introduction of any of the evidence adduced by the Government or to the charge of the court. On appeal they assigned as error that the evidence was insufficient to sustain their convictions; that the explosives statute was unconstitutional; and, finally, that the summation of the prosecuting attorney was prejudicial (R. 24–26). It appears that while the case was pending on appeal, petitioner Drake employed new counsel, who filed an amended brief in his behalf (a copy of which we have obtained), contending that obvious and fundamental errors had been committed at the trial with respect to the admission of testimony and the charge of the court, which should be considered on the appeal, despite the absence of objection at the trial. Specifically, counsel contended, as they do here, that the following testimony of Maddox was erroneously admitted: that he thought there was something wrong with the way defendant Clark was acting when first observed; that he knew petitioner Drake's name was not Wilson; that he searched the defendants for firearms or explosives; and that the tools which he found in the car appeared to be burglar's tools (see pp. 5–6, *supra*). Counsel also argued that it was improper to per-

mit the police department property custodian to testify that the "burglary tools" were turned over to him, and to allow the explosives expert to testify that the dynamite found in the defendants' possession was sufficient to destroy the counsel table and to open a safe or strong box (see p. 6, *supra*). Counsel likewise urged as error the admission of the testimony of the F. B. I. agent that from the expert's examination and from his own knowledge, the material taken from the defendants was explosives. In respect of the trial court's charge, it was contended that the court's reference to "burglar's tools" was improper and that the court should have charged the jury "on circumstantial evidence" (see Pet. 14).

The circuit court of appeals held that only "where exceptional circumstances are present, such as obvious reversible error, or errors that affect the fairness, integrity, or public reputation of judicial proceedings," was it required "of its own motion to set aside the verdict of the jury for an error or errors not brought to the attention of the trial court," and that "This is not such a case" (R. 37).

Petitioners contend (Pet. 2–3, 4, 8, 14, 16–18) that the circuit court of appeals erred in failing to consider and to correct the claimed errors which counsel had called to its attention. There is no merit in this contention insofar as it rests upon the purported failure of the circuit court of ap-

peals to consider the alleged errors, for the opinion discloses that the court did pass upon them, but concluded that they were not of such a serious nature as to warrant application of the doctrine that in criminal cases the federal appellate courts will correct a plain error, even though it was not properly saved for review. *Wiborg* v. *United States*, 163 U. S. 632, 658; see also, *Clyatt* v. *United States*, 197 U. S. 207, 221–222; *Williamson* v. *United States*, 207 U. S. 425, 452–453; *Crawford* v. *United States*, 212 U. S. 183; *Weems* v. *United States*, 217 U. S. 349, 362–363; cf. *Brasfield* v. *United States*, 272 U. S. 448, 450; *United States* v. *Atkinson*, 297 U. S. 157, 160. Since the court below did consider petitioners' contentions of error, the case differs from *Hemphill* v. *United States*, 312 U. S. 657, where it appeared that the Circuit Court of Appeals for the Ninth Circuit might have entertained the view that it was without power to review plain error absent a proper reservation at the trial (see the Government's brief in the *Hemphill* case, No. 369, October Term, 1940, pp. 5–12). But the appellate court's power in this regard is discretionary (*Crawford* v. *United States*, 212 U. S. 183; *Weems* v. *United States*, 217 U. S. 349, 362), and we think that the discretion refers to the determination of whether there is such a denial of justice as to warrant disregard of procedural irregularity, and not to an unfettered option to examine an appellant's claim of error. The appellate court should inquire into

the merits of an appellant's contentions sufficiently to ascertain whether they disclose plain error. Cf. *Bailey* v. *United States*, 13 F. 2d 325 (C. C. A. 9).

It may be that had petitioners objected at their trial to the introduction of the evidence which they now contend was erroneously admitted—particularly that bearing on their possession of burglar's tools and the testimony that the quantity of dynamite found was sufficient to open a strongbox or safe—they would have secured its exclusion on the ground that it was irrelevant and prejudicial. But we submit that the circuit court of appeals was fully warranted in the exercise of sound discretion in affirming petitioners' convictions on the basis of the clear evidence adduced by the Government to prove the essential elements of the offense charged, and that there is no occasion for this Court to intercede at this stage of the case. The Federal Explosives Act, *supra*, pp. 2–3, unqualifiedly proscribes the possession of explosives during time of war without a license. Concededly, there was ample and competent evidence that petitioners did possess explosives and that they did not have any license. Also, there was sufficient evidence to prove that petitioners conspired to possess the explosives, as charged in the indictment. Under these circumstances, it cannot be said that petitioners' convictions have resulted from a denial of a fair trial.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
LEON ULMAN,
MAYTE B. GREENE,
Attorneys.

MARCH 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945